ORIGINAL

No. 94-7743

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

Fred A. Whitaker
Petitioner,

vs.

Superior Court of California,
San Francisco County
Respondent,

Merrill Reese, Inc.
Real party in interest

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE REAL PARTY IN INTEREST MERRILL REESE, INC. SUBMITTED IN OPPOSITION TO PETITION FOR CERTIORARI

(Supreme Court Rule 15)

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Introduction

With this brief, real party in interest Merrill Reese, Inc.[1] responds to the petition for certiorari submitted by Fred A. Whitaker, a recognized vexatious litigant. *In re Whitaker*, --- U.S. ---, 115 S.Ct. 2 (1994); *In re Whitaker*, 6 Cal.App.4th 54, 55 (1992). For the court's convenience, Merrill Reese, Inc. will first summarize the proceedings below, and the legal rulings that prompted Mr. Whitaker's trip to this Court. Merrill Reese, Inc. will also note the

[1] Merrill Reese, Inc. is a duly organized California corporation, with no corporate parents or subsidiaries. (Supreme Court Rule 29.1.)

most significant omissions and inaccuracies in Mr. Whitaker's petition, as required by Supreme Court Rule 15.1, and will then discuss why review by Certiorari is inappropriate in this case.

Summary of Proceedings Below

Mr. Whitaker initiated this lawsuit on April 28, 1994, contending in essence that Merrill Reese, Inc., the operator of a number of drug and sundries stores in San Francisco, California, was improperly collecting recycling taxes on non-alcoholic beer and carbonated fruit drinks. Contrary to the clear language of California's recycling and tax law,[2] Mr. Whitaker asserted that these beverages were exempt from any recycling surcharge, and that Merrill Reese, Inc. was thus overcharging its customers. Mr. Whitaker also included an allegation that the imposition of California Redemption Value (CRV) on the purchase of beverage containers constituted an illegal tax and that Merrill Reese, Inc. was improperly collecting sales taxes on purchases made with food stamps.

Merrill Reese, Inc., by demurrer, sought to have the complaint dismissed. After the matter was submitted to the assigned law and motion judge, the Honorable William Cahill, and pending the filing of the court's written order, Mr. Whitaker filed three simultaneous motions. He first moved for reconsideration of the Court's oral ruling on Merrill Reese, Inc.'s demurrer (even though no formal order had yet been issued). He also moved to have the law and motion judge, William Cahill, dismissed for cause under California Code of Civil Procedure section 170.1; and he finally moved to have Judge Cahill peremptorily removed under Code of Civil Procedure section 170.6. Judge Cahill proceeded to rule on the motions in the order they

[2] *See* California Beverage Container Recycling and Litter Reduction Act (Cal. Pub. Res. Code §14500 et seq.) and California Revenue and Taxation Code sections 6359 and 6373.

were filed. On July 27, 1994, he issued his order on the previous demurrer filed by Merrill Reese, Inc., and dismissed all of Mr. Whitaker's claims, except his assertion that Merrill Reese, Inc. was charging sales taxes on food stamp purchases. Judge Cahill next addressed Mr. Whitaker's motion for reconsideration, and on August 18, 1994 denied the motion, finding that Mr. Whitaker had "presented no new or different facts, circumstances or law." Next, Judge Cahill addressed Mr. Whitaker's disqualification motion for "cause" under California Code of Civil Procedure section 170.1, and ruled that the motion was improper since there had been no service of the motion on the challenged judge. Finally, Judge Cahill accepted Mr. Whitaker's peremptory challenge, "but only so far as it relates to motions other than the Motion for Reconsideration."

While proceeding with the prosecution of his lawsuit -- including unsuccessful attempts to expand the action to add even more novel charges, including claims that Merrill Reese, Inc. is unlawfully discriminating on the basis of age by refusing to sell low alcohol and non-alcoholic beer to minors -- Mr. Whitaker sought appellate review of Judge Cahill's decision to rule on Mr. Whitaker's motion for reconsideration prior to the judge's recusal.

Mr. Whitaker first sought a writ of mandate from the California Court of Appeal. His petition was denied on September 22, 1994. Mr. Whitaker next petitioned for review by the California Supreme Court. That petition was denied on November 2, 1994.

Mr. Whitaker has now sought review by certiorari in this Court.

Inaccuracies And Omissions In Mr. Whitaker's Petition

1. Alternative Relief Is Available

In his petition, at section (C) on page 5, Mr. Whitaker asserts that he "has no adequate remedy without The Supreme Court's review of [the] Writ of Certiorari." This is incorrect.

In *People v. Brown*, 6 Cal.4th 322, 332-334 (1993), the California Supreme Court held that if a litigant is denied due process by a judge's refusal to disqualify himself, the litigant may appeal the court's ruling after final judgment is entered in the case, even if an interim petition for mandamus relief has been denied. Since a final judgment has not yet been entered on Mr. Whitaker's complaint, he has not yet exhausted all alternative remedies. Thus, even if Mr. Whitaker had a valid grievance (which he does not), he has a forum to redress his claims -- an appeal following final judgment to the California Court of Appeal.

2. Mr. Whitaker Has Not Identified Proper Grounds For Jurisdiction

On page six of Mr. Whitaker's petition, at item (E), he asserts that the Supreme Court has jurisdiction over this petition by virtue of the provisions of 28 U.S.C.A. §§ 1651 and 2254. Neither provision is appropriate.

28 U.S.C.A. §1651, commonly known as the All Writs Act, provides the framework for the issuance of extraordinary writs, such as mandamus and prohibition, by the Supreme Court and the federal appellate courts. Pursuant to prior order of this Court, however, Mr. Whitaker may not proceed *in forma pauperis* in submitting petitions for extraordinary writs. *In re Whitaker*, --- U.S. ---, 115 S.Ct. 2 (1994). Mr. Whitaker seeks to evade this prohibition by characterizing his pending petition as one for certiorari; he cannot now escape that characterization by asserting this Court's jurisdiction under the All Writs Act. The provisions of 28 U.S.C.A. §1651 thus cannot support Mr. Whitaker's petition.

28 U.S.C.A. §2254 is equally anomalous. That section provides the framework for issuance of writs of habeas corpus -- writs devoted to reviewing prisoner's claims that they have been unlawfully deprived of their liberty. To the best of respondent's knowledge, Mr. Whitaker

has not been confined in any state prison; and his petition does not contain any reference to a deprivation of liberty. Accordingly, 28 U.S.C.A. §2254 also provides no avenue for jurisdiction over Mr. Whitaker's pending petition.

Mr. Whitaker's petition also fails to advise the Court of the date of entry of the court orders that he seeks to have reviewed, as required by Rule 14(e)(i); and, Merrill Reese, Inc. is not certain whether Mr. Whitaker is asking for review of the trial court's orders, or the state appellate court denials of his interlocutory petitions. For the Court's assistance, however, Merrill Reese, Inc. hereby lists the orders that may have provoked Mr. Whitaker's petition to this Court.

7/27/94	Order Sustaining in Part and Overruling in Part Defendant's Demurrer
8/18/94	Amended Order Sustaining in Part and Overruling in Part Defendant's Demurrer and Granting Defendant's Motion to Strike
8/18/94	Order Re: Plaintiff's Challenge Under C.C.P. §170.1(6)
8/18/94	Order Granting Plaintiff's Challenge Under C.C.P. §170.6
9/22/94	Denial by California Court of Appeal of Petition for Writ of Mandate
11/2/94	Denial by California Supreme Court of Petition for Writ of Review

3. Mr. Whitaker Did Not Assert Any Federal Law Claims in the Trial Court

On page 11 of Mr. Whitaker's petition, at item (H), he asserts that he first raised the federal issues invoked in this petition in his Motion for Reconsideration, which was submitted to the California Superior Court. He also intimates that federal issues permeated his lawsuit in the state court. In fact, Mr. Whitaker's lawsuit did not raise a single claim based on federal law, and Mr. Whitaker did not raise any federal issues at all until he submitted his petition for a writ of mandate to the California Court of Appeal. With that petition, Mr. Whitaker stated

simply that Judge Cahill's decision to rule on his motion for rehearing was "[a]n Illegal Act Under CCP# 170.3(C)(3)(5),CCP# 170.6(2) and A Violation of Petitioner's Due Process & Equal Protection Constitutional Legal Rights." (Petition for Writ of Mandate to the California Appellate Court ¶ 1.04.)

Review By Certiorari Is Inappropriate

Both procedurally and substantively, Mr. Whitaker's petition for certiorari is inappropriate. Procedurally, the petition must fail because the California courts below have not yet entered a final judgment. Only the final judgments of state courts may be reviewed by certiorari, and even then, only judgments that adjudicate federal questions are properly considered by this Court:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C.A. §1257(a).

As discussed above, under California law, a litigant who claims he was denied due process by a judge's refusal to timely recuse himself may appeal his claim after judgment in the trial court is entered. *People v. Brown*, 6 Cal.4th 322, 332-334 (1993). No judgment has yet been rendered on Mr. Whitaker's complaint, and Judge Cahill's orders in the trial court, and the appellate denials of Mr. Whitaker's petitions for extraordinary interlocutory relief, are accordingly not final judgments. *See also United States v. State of Wash*, 573 F.2d 1121 (9th

Cir. 1978) (holding that a judge's refusal to recuse himself was not an appealable final order). Thus, review by certiorari is procedurally inappropriate.

Additionally, Mr. Whitaker's claims are, in any event, substantively insupportable. At heart, he claims a federal constitutional right to "judge shop" in state courts -- to file a motion, secure a ruling, and, if dissatisfied, seek to disqualify the judge and simultaneously file a motion for reconsideration to have the matter considered by someone else. California's appellate courts have long rejected such gamesmanship; and not surprisingly, Mr. Whitaker cannot cite a single federal case, statute, rule, procedure, doctrine or theory that even hints that the rule should be otherwise.

In other words, Judge Cahill, and the California appellate courts that considered Mr. Whitaker's writ petitions, directly followed established law and in no way contravened petitioner's federal due process rights. And contrary to Mr. Whitaker's apparent assertions, this established law was not applied invidiously just to him, but has long been applied to all litigants employing similar tactics. Thus, for example, in *Buchanan v. Buchanan*, 99 Cal.App.3d 587, 594-595 (1979) the California court specifically held that a "motion to reconsider was part of the motion to dismiss, and was a continuation of the hearing in which the order was rendered." Accordingly, the court ruled, a recusal motion could not be made while the court was being asked to reconsider its ruling:

> [a] challenge under section 170.6 is untimely if filed between the issuance of an order . . . and the hearing on the motion to reconsider that same order. A section 170.6 challenge cannot be lodged while a hearing is pending . . . and it is our conclusion that, for purposes of section 170.6, the hearing on a pretrial motion does not conclude until after the reconsideration motion, if any.

Id; *see California Fed. Sav. & Loan Assn. v. Superior Court*, 189 Cal.App.3d 267, 270-71 (1987) (a judge may not be recused in the middle of an ongoing proceeding); *see also Curtin v.*

Koskey, 223 Cal.App.3d 1334, 1340 (1991) ("One trial court judge may not reconsider and overrule a ruling of another judge"); *McCartney v. Superior Court*, 223 Cal.App.3d 1334, 1340 (1990) ("A motion to reconsider should be heard by the judge who made the underlying order wherever possible").

Mr. Whitaker has no substantive claim; he has not been deprived of any federal rights and he is procedurally barred from seeking certiorari because no final judgment has yet been entered in this case.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted this 9th day of March, 1995.

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